Neutral Citation Number: [2024] EWCA Crim 1488

Case No: 201404491 C2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT BURNLEY
HHJ CORNWALL
T20067228

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/12/2024

Before :

LORD JUSTICE WILLIAM DAVIES
MRS JUSTICE FARBEY
and
HER HONOUR JUDGE SHANT KC
(SITTING AS A JUDGE OF THE CACD)

- -

Between :

GARETH TAYLOR	**Applicant**
- and -	
REX	**Respondent**

- -
- -

Ms Hayley Douglas (instructed by the **Registrar of Criminal Appeals**) for the **Applicant**
Ms Esther Schutzer-Weissmann (instructed by the **Crown Prosecution Service**) for the **Respondent**

Hearing date : 22 November 2024

Approved Judgment

This judgment was handed down remotely at 10.30am on 5 December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Judgment Approved by the court for handing down.

MRS JUSTICE FARBEY :

Introduction

1. The provisions of the Sexual Offences (Amendment) Act 1992 apply. Under those provisions, no matter relating to the victims of the sexual offences mentioned in this judgment shall during their lifetime be included in any publication if it is likely to lead members of the public to identify them. This prohibition applies unless waived or lifted in accordance with s.3 of the Act.

2. On 13 April 2007 in the Crown Court at Burnley before HHJ Cornwall, at a plea and case management hearing, the applicant (then aged 21) pleaded guilty to one offence of sexual activity with a child contrary to section 9 of the Sexual Offences Act 2003. At the same time, he pleaded guilty to a breach of a Sexual Offences Prevention Order ("SOPO") contrary to section 113(1) of the same Act.

3. On 21 May 2007, the judge imposed an indeterminate sentence of imprisonment for public protection ("IPP sentence") with a minimum term of 18 months for the section 9 offence. He imposed a concurrent sentence of 2 years' imprisonment for the breach of the SOPO.

4. The Registrar referred to the full court this application for an extension of time of 5866 days for leave to appeal against sentence. The applicant drafted his own grounds of appeal but we have had the benefit of perfected written grounds, supplemented by helpful oral submissions, from Ms Hayley Douglas who did not appear below. On the direction of the Registrar, Ms Esther Schutzer-Weissmann appeared for the respondent. She too did not appear below. She supported the appeal both in writing and orally.

Facts

5. The offending took place on 2 December 2006. The applicant was aged 21 at the time. The victim, aged 15, was the girlfriend of one of his friends. He had known her for around five years. Some time before the offence, the victim's mother had let the applicant stay with them but when they later found out that the applicant was on the sex offenders' register, following an offence committed in 2005, the victim's mother told her to stop spending time with him.

6. On the day of the offending the applicant visited his friend's house and spent time there with his friend and the victim. The applicant offered to walk the victim home and then invited her back to his house to meet some other friends. When they got to the applicant's house, he asked her up to his bedroom to listen to music. While they were sitting on his bed, he tried to kiss her but she told him to stop. The applicant pushed her back, forced his hand inside her jeans and roughly penetrated her vagina with his fingers for three to four minutes. When the victim told him that she needed to go home, the applicant went downstairs and asked his father to drive her home.

7. At the date of sentence, the applicant had 8 previous convictions. These earlier offences included battery, being found on enclosed premises for unlawful purpose, disorderly behaviour, common assault and breach of a rehabilitation order. Notably, on 13 December 2005, the applicant had been sentenced to 12 months in a Young Offender Institution for his guilty plea to an earlier section 9 offence committed against a child

under 16. The facts of that offence were that, on 9 August 2005, he had penetrated the child's vagina with his penis. He was made subject to a SOPO for five years which prohibited him from having unsupervised contact with a child under the age of 16 years. By having unsupervised contact with the victim of the section 9 offence in 2006, the applicant breached the SOPO.

Sentencing remarks

8. In his sentencing remarks, the judge said that he was "very conscious" of the applicant's age and of the difficulties that he had experienced in his early life. He considered the pre-sentence report, which described the applicant's immaturity and his educational and learning difficulties. He accepted in the applicant's favour (perhaps generously) that the section 9 offence was opportunistic.

9. On the other side of the scales, the judge emphasised that the applicant knew that the victim was under 16. He knew of her reluctance because he had earlier tried to kiss her at her boyfriend's house while he was out of the room. The judge emphasised that the offence was a repetition of the alarmingly similar behaviour which had resulted in the earlier extended sentence. During the course of that sentence and thereafter, the Probation Service had gone to considerable lengths to help the applicant. He had been repeatedly reminded of what the SOPO meant but was unable to relate to women of his own age through a fear of being controlled.

10. The judge went on to consider the statutory provisions in relation to dangerous offenders as then in force. He stated that the section 9 offence was the applicant's second specified offence under those provisions. It followed that there was an assumption that he was to be regarded as a dangerous offender, meaning someone who presented a significant risk of serious harm to others. The judge stated that he was bound to assume that the applicant was dangerous unless it seemed to him to be unreasonable to make that assumption. He could see no basis for thinking that it would be unreasonable.

11. In concluding that the applicant was dangerous, the judge stated that the Probation Service had done all that they were able to do following the earlier sexual offence but with no result. There was plainly a need for prolonged and extensive further work to be done. An IPP sentence was inevitable.

12. The judge said that the proper determinate sentence would have been 5 years imprisonment after a trial which would have been reduced to 40 months after full credit for the applicant's guilty plea. The minimum term of the IPP sentence was half of 40 months, making 20 months, less 56 days representing time already spent remanded in custody. In this way the judge reached the total of 18 months as we have already described. The judge then imposed the 2-year concurrent sentence for breach of the SOPO and made ancillary orders including a fresh SOPO.

Events post-dating the sentencing hearing

13. The applicant was released on life licence in 2017, nearly 9 years after the expiry of his minimum term. He has since then been recalled to prison twice for breach of licence conditions but he has not reoffended. Irrespective of the overall justice of the legislative scheme for IPP sentences, which has been repealed, our task is limited to considering

whether the sentence imposed by the judge was manifestly excessive or wrong in principle. We must undertake this task on the basis of the provisions made by Parliament for the imposition of IPP sentences that were in force at the time that the sentence was imposed (*R v Roberts* [2016] EWCA Crim 71, [2016] 2 Cr. App. R. (S.) 14, paras 17-21).

Legal framework

14. Chapter 5 of the Criminal Justice Act 2003 ("the 2003 Act") sets out the sentencing regime for dangerous offenders. Section 224 defines "specified offence" as a violent or sexual offence that is specified in Schedule 15 to the 2003 Act. "Serious offence" is defined as a specified offence that is punishable by life imprisonment or a determinate sentence of 10 years or more. "Serious harm" is defined in section 224 as "death or serious personal injury, whether physical or psychological." In the present case, we are concerned with the risk of serious psychological harm.

15. An offence under section 9 is a serious, specified offence for the purposes of the Act and therefore the provisions for sentencing dangerous offenders set out in Chapter 5 applied to this case. Prior to amendments made in 2008 and in 2012, section 225 provided:

> "225 Life sentence or imprisonment for public protection for serious offences
>
> (1) This section applies where—
>
> (a) a person aged 18 or over is convicted of a serious offence committed after the commencement of this section, and
>
> (b) the court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences.
>
> (2) If—
>
> (a) the offence is one in respect of which the offender would apart from this section be liable to imprisonment for life, and
>
> (b) the court considers that the seriousness of the offence, or of the offence and one or more offences associated with it, is such as to justify the imposition of a sentence of imprisonment for life, the court must impose a sentence of imprisonment for life…
>
> (3) In a case not falling within subsection (2), the court must impose a sentence of imprisonment for public protection…".

16. Section 229 stated:

> "229 The assessment of dangerousness
>
> (1) This section applies where—

> (a) a person has been convicted of a specified offence, and
>
> (b) it falls to a court to assess under any of sections 225 to 228 whether there is a significant risk to members of the public of serious harm occasioned by the commission by him of further such offences.
>
> …
>
> (3) If at the time when that offence was committed the offender was aged 18 or over and had been convicted in any part of the United Kingdom of one or more relevant offences, the court must assume that there is such a risk as is mentioned in subsection (1)(b) unless, after taking into account—
>
> (a) all such information as is available to it about the nature and circumstances of each of the offences, (b) where appropriate, any information which is before it about any pattern of behaviour of which any of the offences forms part, and
>
> (c) any information about the offender which is before it,
>
> the court considers that it would be unreasonable to conclude that there is such a risk.
>
> (4) In this Chapter "relevant offence" means—
>
> (a) a specified offence…"

17. In *R v Lang* [2005] EWCA Crim 2864, [2006] 2 Cr. App. R. (S.) 3, para 15, the court provided authoritative guidance on the application of these provisions. It held that section 229 created a rebuttable assumption of dangerousness in relation to adults with a previous specified offence conviction. Importantly, the court added that:

> "…unless the information about offences, pattern of behaviour and the offender (to which regard must be paid under s.229(3)) show a significant risk of serious harm (defined by s.224 as death or serious injury) from further offences, it will usually be unreasonable to conclude that the assumption applies."

18. The court observed at para 17(iv) that the huge variety of offences in Schedule 15 included many which, in themselves, were not suggestive of serious harm. Repetitive violent or sexual offending at a relatively low level without serious harm did not of itself give rise to a significant risk of serious harm in the future. There might, in such cases, be some risk of future victims being more adversely affected than past victims but this, of itself, did not give rise to significant risk of serious harm. The court held at para 17(vi) that, when sentencing young offenders, judges should bear in mind that, within a shorter time than adults, they might change and develop. This and their level of maturity might be highly pertinent when assessing what their future conduct might be and whether it might give rise to significant risk of serious harm.

19. In *Roberts*, para 24, the court confirmed that under the provisions of the 2003 Act before changes made in 2008, the judge was bound to assume that the offender was dangerous if (as in the present case) he had committed a previous specified offence, unless the assumption was unreasonable. The judge was thereafter obliged to pass an IPP sentence. The court made clear, at para 42, that where a judge had followed the provisions of the 2003 Act and had passed an IPP sentence in circumstances where it was properly open to the judge to do so, this court would not revisit the sentence in the absence of clear new points.

20. In *R v Williams* [2024] EWCA Crim 686, para 15, the court reiterated the guidance in *Lang* that the decision of the sentencing judge involved an evaluative judgment akin to the exercise of a discretion. This court should not overturn the judge's decision merely on the ground that it would have reached a different one. It must be persuaded that the sentencing decision involved an error of principle or was outside the range of conclusions which were properly open to the judge.

The parties' submissions

21. In her written and oral submissions, Ms Douglas submitted that the IPP sentence was wrong in principle. She submitted that the judge did not correctly apply the statutory test of dangerousness. She contended that it was not apparent from the judge's sentencing remarks that he had been directed to, or applied, the *Lang* principles. She relied on the content of the pre-sentence report and of a psychological report by Dr Paul Withers, dated 10 November 2005, which appears to have been produced in relation to the first section 9 offence but which may have been provided to the judge. She submitted that, had the proper attention been given to the applicant's age, learning disabilities and the nature of the offences, it could not have been said that he posed a significant risk of causing death or serious injury to the public from future offending. While not seeking to minimise the applicant's offending, she submitted that the impact on the victim had been described by the judge in terms that could not be described as serious psychological harm of the sort that would satisfy the test for "serious harm" in section 225. It was unreasonable to conclude that the assumption of dangerousness applied.

22. Supporting Ms Douglas' submissions, Ms Schutzer-Weissmann submitted that the judge did not apply the correct sentencing principles in imposing an IPP sentence. The judge had in effect concluded that once the second section 9 offence had been committed, the applicant was assumed to be dangerous unless that assumption was demonstrated to be unreasonable. She submitted that such an approach was contrary to *Lang* which had clarified that the assumption should not be made because of the repeated offending unless the information available about the offences committed, a pattern of behaviour and the offender showed a significant risk of serious harm from further offending such that it would be unreasonable to make that assumption. She submitted that there was no evidence that the applicant's offending had caused serious harm in the past and that the reports did not demonstrate that he posed a risk of serious harm at the date of sentencing.

Discussion

23. In light of the nature of the sentence imposed, we have given careful consideration to the reports before us. The author of the pre-sentence report, Mr Chris Parkinson, had

considerable knowledge of the applicant as he had been the applicant's supervising Probation Officer in relation to his first section 9 offence. In his full and detailed report, he expressed his serious concern that the applicant had ignored the SOPO after extensive and repeated reminders of its effect. It was difficult to know how the applicant's risk to girls could be reduced. He acknowledged that the applicant had a very limited intellectual capacity and a history of abuse as a child. He had used alcohol as a means of dealing with his past and also used cannabis which had influenced his offending behaviour. Nevertheless, it was his view that, even after extensive work with the applicant on licence, he remained a high risk to girls. He was falling into an entrenched pattern of offending.

24. Mr Parkinson concluded (grammatical errors retained):

> "[The applicant] presents as someone of only limited intellectual ability and he lacks maturity commensurate to his age. He finds himself attracted to people who are significantly younger than him. He now has previous convictions of both a sexual and violent nature towards young females and it is of concern that his behaviour is developing into an entrenched pattern despite extensive specialist work having been undertaken with him. The mixture of both violent and sexual offences against females would indicate the potential for the applicant to be a significant serious risk of harm to the public in the future and therefore the issue of dangerousness arises. It is my assessment that on the evidence of the total his past and present offending, the level of serious psychological harm that may arise from future offending of this nature would fall within the parameters of the public protection sentence and framework. The potential for physical harm also cannot be discounted."

25. Ms Douglas criticised this conclusion on the basis that it was vague and misstated the statutory language. However, we regard Mr Parkinson's report as sufficiently clear overall to found a conclusion of dangerousness.

26. Dr Withers' report painted a similar picture. He concluded that the applicant presented a continuing risk of violent offending, and possible risk of further sexual offending. The applicant required an extensive and lengthy package of psychological intervention and active support to minimise the risk of him reoffending. Dr Withers agreed with Mr Parkinson's view that the applicant continued to present a risk to others, especially to girls and young women to whom he felt close. In our judgment, both the pre-sentence report and Dr Withers' report support rather than undermine the judge's conclusions.

27. The judge did not cite *Lang* or set out its principles. He was not bound to do so. His duty was to apply the principles in *Lang* to the case before him but he was not required to do so in any formulaic way. Reading the substance of his sentencing remarks fairly and in the round, he plainly had the approach in *Lang* in mind.

28. The judge's sentencing remarks conveyed, in straightforward terms, the nature of the assumption that he had to make and explained why it was not unreasonable to make that assumption. He plainly had proper regard to the evidence before him which he analysed with care. He had in mind the applicant's young age, immaturity and

psychological problems. There is little evidence before us to suggest that the applicant's young age should have suggested to the judge that he would or might change to such an extent that he should not be regarded as dangerous. Nor are we persuaded that his immaturity or psychological problems should have served to undermine the conclusion that he was dangerous.

29. The judge was faced with a situation where the applicant had penetrated the vagina of a child with his penis in August 2005. He had gone on to reject attempts to help him and to breach a SOPO by committing the same offence, albeit using his fingers, in 2006. We reject the proposition, which Ms Schutzer-Weissmann appeared to advance, that the change from penis to fingers marked a de-escalation in his offending rather than demonstrating (as the pre-sentence report had concluded) an entrenched pattern of behaviour.

30. We reject the submission that the risk of further sexual offending against girls did not give rise to a risk of serious harm in the future. It is future risk with which the provisions for sentencing dangerous offenders are concerned. The fact that the two young victims of the section 9 offences do not appear to have suffered serious psychological harm was fortuitous. The judge was entitled to find that further penetrative sexual activity with children by the applicant risked such harm to future victims.

31. The proximity in time of the two section 9 offences, their similar circumstances and the applicant's failure to respond to the Probation Service's attempts to help him keep to the SOPO meant that the judge was unarguably entitled to conclude that the applicant was dangerous and to impose an IPP sentence. For these reasons, the grounds of appeal are not reasonably arguable. We refuse an extension of time which would serve no purpose. We would refuse leave to appeal.